Filed 9/11/15 P. v. Evans CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND DEON EVANS, Defendant and Appellant.	E061508 (Super.Ct.No. FVI1400025) OPINION

APPEAL from the Superior Court of San Bernardino County. Colin J. Bilash, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Raymond Deon Evans guilty of home invasion robbery (Pen. Code, §§ 211 and 213, subd. (a)(1)(A) (count 1); first degree burglary (Pen. Code, § 459 (count 2)); assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1) (count 3)); and assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4) (count 4)). With respect to count 1, the jury further found true that appellant had committed the offense in concert with two or more persons (Pen. Code, § 213, subd. (a)(1)(A)). The trial court sentenced appellant to nine years in state prison.

On appeal, defendant raises three claims of error: (1) that the admission into evidence of a statement by his then three-year-old daughter—a percipient witness to the events at issue—through the testimony of the police officer who heard it violated his constitutional rights to confrontation and a fair trial; (2) that exclusion pursuant to Evidence Code[1] section 352 of certain evidence proffered by defendant to impeach the testimony of one of the victims was an abuse of discretion and an error of constitutional magnitude; and (3) that the evidence presented at trial was insufficient to support defendant's conviction of home invasion robbery on a natural and probable consequences theory.

We reject each of these claims of error, and affirm.

---

[1] All further undesignated statutory references are to the Evidence Code.

I. FACTS AND PROCEDURAL BACKGROUND[2]

On December 18, 2012, victim 1 was babysitting her three-year-old niece at the apartment of her sister (victim 2), the child's mother. Defendant is the father of the child, and the former boyfriend of victim 2. Victim 1 testified that she answered a knock at the door, thinking it to be a neighbor with whom she had just been texting. Instead, it was an unfamiliar female. Victim 1 then attempted to close the door. Before she could do so, she heard a male voice say "get her," and a number of people rushed out from a concealed area nearby, who then pushed their way into the apartment. Victim 1 testified that there were seven assailants—three males, four females—and that she recognized three, including defendant, and two of the females.

Once inside, the group that entered the apartment began hitting victim 1 "[e]verywhere" on her body, despite her efforts to fight back. They tried to, and eventually did, put a pillow over her face, and at some point one of the female assailants had her hands around victim 1's neck. Victim 1 fell or was pushed to the floor, and defendant kicked her in the face, and stomped on her back. Defendant also instructed one of the others to cut victim 1's hair, as retaliation for her pulling out part of the hair weave of one of the female assailants during the struggle; "a lot" of hair on the left side and back of victim 1's head was cut by someone. The assault ended when victim 1 pretended to pass out, after which she heard someone—a female—exclaim profanely, and say "let's go," which they did. The assailants took a television from the apartment when they left;

[2] We do not attempt an exhaustive summary here, limiting our discussion to those matters directly relevant to defendant's claims of error or useful for context.

it was later located at the residence of the two female assailants whom victim 1 had recognized. A short time after the assailants left, victim 1 opened the door to the apartment and started screaming. Neighbors called the police.

A responding officer testified that when he arrived on scene, he performed a safety search to assure no one else remained in the residence. When he entered the child's room and found the child there, he asked if she was okay. Her response was to say "'My daddy said stay in the room and close the door.'"

As a result of the attack, victim 1 sustained a black eye, in addition to various other bruises and scratches over many parts of her body, and she testified that her "head hurt bad." She did not go to the hospital immediately, but did seek treatment on December 26, 2012, because she was still in pain.

Victim 1 testified that during the incident defendant repeatedly asked "'[w]here's the gun?'" Victim 2 explained this question, describing how, some weeks prior to the attack on victim 1,[3] defendant had been at the apartment to visit the child, and had left a handgun behind. The child discovered the gun underneath a pillow on a couch a week or two after the visit, picked it up, and handed it to her mother, victim 2. Victim 2 "got rid of" the gun by giving it to a friend, and told defendant that it was no longer in the apartment. Defendant nevertheless demanded the gun back, first by telephone, and then again in person, by coming over to victim 2's apartment unannounced on November 2,

[3] Victim 2's estimation was three weeks to a month earlier, but other testimony by a police officer who had responded to an earlier incident at her residence suggests that it was earlier than that. The discrepancy is not pertinent to matters at issue in this appeal.

2012. When victim 2 did not answer the door, defendant kicked in the door and entered the residence. On that occasion, he left after seeing victim 2 was already on the telephone with the police.

The defense argued that defendant was not present during the December 18, 2012 attack on victim 1, presenting alibi evidence from his mother and his mother's boyfriend. The defense's theory of the case was that defendant was framed as part of an ongoing feud between the victims and defendant and his friends.

Prior to trial, defendant brought a motion in limine seeking to exclude any testimony from the child, by then five years old, on the ground that she was incompetent to testify, arguing that she "does not have the ability to accurately perceive, remember and truthfully recount events." The trial court held a hearing pursuant to section 402, and found that the child was indeed not competent to testify at trial—a finding that no party has disputed either in the trial court or on appeal. Specifically, the court found that the child—even though she had some conception of what it meant to tell the truth as opposed to lying—did not have the maturity to recount only her own recollections, rather than accept the suggestions of her interlocutor while on the stand, rendering any testimony she might give unhelpful to the jury. Nevertheless, the trial court allowed her out of court statement, that her "daddy said stay in the room and close the door," be presented to the jury through the testimony of the officer who heard it, based on the spontaneous statement exception to the hearsay rule, codified in section 1240.

At trial, during the cross-examination of victim 1, the defense asked her whether, in the early morning hours of December 19, 2012, she had started fires at two locations, one at the home of defendant's mother, the other at the home of one of the female assailants whom she had recognized. She denied doing so. Out of the presence of the jury, defense counsel proposed to introduce the testimony of two witnesses—namely, defendant's mother and her boyfriend—that they saw victim 1 lighting a fire at their residence and running away, and another witness who would testify that she had threatened to commit arson if anything happened at her residence. The prosecution represented that it could present evidence from a police officer that victim 1 was with him at the times the fires were allegedly set. The court excluded the proffered evidence pursuant to section 352.

II. DISCUSSION

A. The Child's Statement Was Properly Admitted.

Defendant suggests that the police officer's testimony regarding the child's statement that her "daddy said stay in the room and close the door" was not properly admitted under the spontaneous statement exception to the hearsay rule because "the court had just ruled [she] was incompetent to testify." He also questions whether there was any evidence that the statement was made under any stress or excitement, as required for the exception to apply. He contends that the admission of her statement violates his rights to due process of law and confrontation. We find no error.

The requirements for the spontaneous statement exception to the hearsay rule are "well established." (*People v. Merriman* (2014) 60 Cal.4th 1, 64 (*Merriman*).)

"""(1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]'" (*Ibid.*)

Each of these requirements was satisfied with respect to the statement at issue. The commotion caused by the invasion of the apartment by seven assailants, and the violent struggle between them and victim 1, naturally would suffice to produce nervous excitement in any person in the apartment, let alone a small child, sufficient to render their utterance spontaneous and unreflecting. There was no substantial lapse of time between the event and the utterance, or any other sign the statement was the product of reflection or contrivance, either on the part of the child or on the part of anyone who might try to coach her responses. Rather, the statement was an unprompted expression of the child's perceptions, relating to the circumstances of the occurrence preceding it.

Defendant's further arguments on appeal are foreclosed by well-established law. He suggests that the trial court's finding that the child was not competent to testify as a witness should have some bearing on whether the statement is admissible as a spontaneous utterance. It does not. (See *In re Daniel Z.* (1992) 10 Cal.App.4th 1009, 1022 [admissibility of hearsay statement under spontaneous statement exception "does not require competency of the hearsay declarant"].) He further contends that admission of the child's statement violates his federal constitutional rights to due process and

confront the witnesses against him. It does not. (*Merriman*, *supra*, 60 Cal.4th at p. 67 [rejecting similar arguments].)

We need not address the parties' arguments regarding whether any error was prejudicial, because we find no error in the first instance.

B. The Trial Court Did Not Err by Excluding the Defense's Proposed Impeachment Evidence.

Defendant contends that the trial court abused its discretion by excluding his proffered evidence, purporting to show victim 1 was involved in lighting two fires early in the morning on the day after the events in victim 2's apartment, and contends that the error violated his constitutional rights. We find no error.

Section 352 permits the exclusion of relevant evidence where "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review a trial court order denying a motion to exclude evidence under this section for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) "'A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]'" (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.)

The trial court's ruling here did not exceed the bounds of reason. Whether or not victim 1 either threatened to or actually was involved in lighting several fires *after* the

events at issue in this case, including one at defendant's mother's house, has no tendency in reason to prove or disprove any fact underlying defendant's convictions. Defendant argues that the alleged arson constitutes a crime of moral turpitude, tending to show victim 1 to be uncredible. But the alleged arson could just as easily—albeit just as speculatively—be understood to *support* victim 1's testimony: From this perspective, why else would she engage in a retaliatory act of arson against defendant's family home, if he were not in fact one of her assailants? To allow the proffered evidence would have created a substantial danger of confusing the issues, generating a mini-trial, not only with respect to whether victim 1 was involved with any actual or threatened lighting of fires at all, but also regarding how those alleged actions should be interpreted with respect to matters actually at bar. The trial court's ruling is a paradigmatic example of the proper application of section 352 "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.)

Defendant further argues that his constitutional rights were violated by the exclusion of the proffered evidence impeaching victim 1. We disagree. "Typically, the application of Evidence Code section 352 to defense evidence does not infringe on a defendant's constitutional rights. [Citation.] . . . 'Although completely excluding evidence of an accused defense theoretically could [violate these rights], excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense.'" (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1063-1064.) Defendant here was only prevented from impeaching a witness on a collateral

issue, not directly bearing on the charges against him, and only tied to the facts underlying those charges by speculation. He was permitted to present evidence in support of his defense, namely, that he was not present for the events at issue. The exclusion of his proffered impeachment evidence on a collateral issue did not violate his constitutional rights.

Again, because we find no error, we need not address the parties' arguments regarding whether any error was harmless.

C. The Robbery Was a Natural and Probable Consequence of the Burglary and Assaults.

Defendant contends that the evidence presented at trial was insufficient to support his conviction for home invasion robbery, arguing that nothing supports the prosecution's theory that the taking of victim 2's television, directly performed by someone other than defendant, was a natural and probable consequence of the burglary and assaults. We reject defendant's argument.

Under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the target offense he actually intends, but also of "any other offense that was a 'natural and probable consequence' of the crime aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 260.) Liability "'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'" (*People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*).) "Whether a nontarget offense is a reasonably foreseeable consequence of the target offense is a fact-specific inquiry to

be resolved by a jury." (*People v. Favor* (2012) 54 Cal.4th 868, 882.) "When a defendant challenges the sufficiency of the evidence to support his criminal conviction, this court '"'review[s] the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'"'" (*People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1108-1109 [Fourth Dist., Div. Two].)

The evidence presented at trial was sufficient to support the jury's finding that the robbery—the taking of the television—was the natural and probable consequence of the burglary and assaults, under the circumstances of this case. The testimony of victim 1 and victim 2 supports the theory that a primary motive for the burglary and assaults was to retrieve defendant's gun from the apartment, not just to assault victim 1, as defendant puts it in briefing on appeal. It is hardly a stretch to imagine that someone in a group of people forcing their way into a residence with the intent to take one item might also take other items of value, if the opportunity presented itself. Even if defendant himself did not in fact anticipate such a possibility, a reasonable person in his position would have, so he is properly punished under a natural and probable consequences theory. (*Medina*, *supra*, 46 Cal.4th at p. 920.)

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.